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No. 80-121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL-CIO,
Petitioner

v.

MIDWEST STOCK EXCHANGE, et al.,
Respondents

and

NATIONAL LABOR RELATIONS BOARD,
Party in Interest

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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Pursuant to Rule 24(4), petitioner herewith addresses a matter first raised in the memorandum submitted by the National Labor Relations Board. The brief in opposition filed by respondents has failed to bring forth any new arguments entitling petitioner under the Rule to further response, and accordingly, petitioner makes none.

The Board has stated, in Item 3 of its memorandum, at p. 4, that "it did not file its own petition because it viewed the disagreement between the Board and the court as presenting only the issue of application of the established *Milchem* principles to the particular facts here. This Court has indicated that it will not ordinarily review such an issue. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951)." This reply brief will be confined to comment on that singular view.

The pages from *Universal Camera* cited by the Board in its memorandum do not spread as wide a canopy as the Board, in its inertia, would have us believe. What this Court did say should every now and then bear repeating, 340 U.S. 474, 490-491:

> Our power to review the correctness of application of the present standard ought seldom be called into action. Whether on the record as a whole there is substantial evidence to support agency finding is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

If this proceeding involved no more than a substantial evidence question, petitioner would agree that it would not merit review and would not have, accordingly, brought this petition here in the face of the Board's apparent disinclination to protect its right to make determinations of fairness in elections cases. But this Court's *Universal Camera* rule has not broadened beyond what this Court said merely because it has been in existence for more than a quarter century, or because it is convenient to cite to forego a broad range of case difficulties.

Even the Board's stated perception of what the lower court held places serious doubt upon the applicability of *Universal Camera* in this case. The Board has said it viewed the lower court's disagreement as presenting "only the issue of application of the established Milchem principles to the particular facts here."

If there is only the application of established principles to particular facts (which are not even in dispute), then the question before us is purely one of law, not of substantial evidence at all! The dispute is over the principles, what they mean, how they should be applied, how they may be evaluated—judicial issues totally.

This brings us full circle to the primary question presented by petitioner in the first instance and the reasons why the writ should be granted.

The Board, in its decision in this case, applied its established principles in *Milchem* to the particular facts before it. Its principles, as we earlier stated, contained two distinct elements: (1) a prohibition of sustained or prolonged conversations so as to prevent electioneering at the polls, and (2) a rule of realism that would not embrace trifles. There was never any question of evaluating evidence to determine if its substantiality, or lack of it, supported application of these principles. The Court below distorted and amended those principles upon facts already established.

Petitioner is more concerned about the Board's failure to seek certiorari in this case when it should have done so. But we are aware of certain realities in the world of labor litigation, and because of such awareness, petitioner states herewith that no request

was even made of the Board to seek certiorari because petitioner had no confidence that the Board would do so. These realities are that the Board, in its enforcement litigation in the various courts of appeals, is taking a terrible beating in attempting to have its orders upheld. Without in any manner seeking to lay out a proper scholarly analysis of the subject, we rest upon our regular reading of the appellate rulings, week in and week out. As one isolated example, counsel opened Volume 103, Labor Relations Reference Manual, covering weeks from January 1, 1980, through April 30, 1980, admittedly a very short period of time. Some 55 decisions of reviewing courts of appeals in enforcement proceedings were catalogued, limited to holdings not decided per curiam. The effort was to focus only on cases of sufficient substance to warrant signed judicial opinion. Of these 55 cases, only 20 received full enforcement. Two others were enforced as modified, and 33 others, or 60% of the number, were either reversed in part or in whole.

Obviously, we are not contending that any particular case was decided either correctly or incorrectly. We are not even suggesting that the Board seek certiorari in any particular case, especially in view of the burdens upon the docket of this Court. We are saying only one thing, and one thing only, at this point: when an agency's decisions in cases where there are questions of substance are being set aside even in part at a rate of 60%, one might conclude that there is disarray somewhere in the spectrum.

The sole point that we are trying to make is that it behooves a private party, as is petitioner here, to occasionally seek to vindicate public rights under the

statute. The Board is not always capable of doing so. It was submitted in our petition that the ruling below is in plain violation of the principles of law handed down by this Court in *NLRB* v. *Mattison Machine Works,* 365 U.S. 123 (1961). That salutary ruling, as we read the cases in the ensuing years, has nearly atrophied from disuse or forgotten neglect.[1] The Board, battered by hordes of adverse rulings in reviewing courts, is not always able to be perceptive in what it brings to the heavy docket of this Court for review, and can easily become accustomed to allowing the principles of *Mattison Machine Works* to gather dust. It likewise has apparently not appreciated the importance in agency decision making of *Federal Trade Commission* v. *Mary Carter Paint Co.,* 382 U.S. 46 (1965).

In summary, we are appreciative, even in view of our foregoing commentary, of the burdens and difficulties confronting the Board in its selection of cases for the certiorari process. But court dockets throughout the American judicial system have their burdens, too, and to allow a ruling like the one below to go unchallenged is a massive invitation to more litigation, to more legal quibbling and re-writing of Board rules, as the lower court has done here, to more technical resistance to Board orders that will not only bring more litigation to the courts but will seriously impede the enforcement of the national labor policy.

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[1] The Board, in its brief to the Seventh Circuit, cited *Mattison,* among a mass of other cases. The opinion, of course, of the court below, made no mention whatever of *Mattison.*

The vitally important public issue in this case cannot be obscured by the Board's wounded enforcement efforts. Free and fair elections in our society cannot be cavalierly tossed aside in the courts, as happened here, without severe injury to the whole democratic process. That is far more important than the Board's appellate misperception of the scope of this case.

The writ should be granted.

Respectfully submitted,

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